



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 38

RIN: 2900-AO12

Parents Eligible for Burial

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends existing regulations to reflect a new statutory authority to extend eligibility for burial in a national cemetery to include parents of certain veterans, as authorized by the Veterans' Benefits Act of 2010 (the Act), enacted on October 13, 2010. The Act authorizes the Secretary of Veterans Affairs to inter the biological or legally adoptive parents of a deceased veteran if the deceased veteran is a hostile casualty or dies from a training-related injury, is interred in a VA national cemetery in a gravesite with available space, and has no spouse or child who is buried, or surviving spouse or child who, upon death, may be eligible for burial, in a national cemetery.

DATES: Effective Date: This rule is effective [Insert date of publication in the FEDERAL REGISTER].

Applicability Date: In accordance with section 502(e) of the Act, this amendment applies to parents who die on or after October 13, 2010, of veterans who die on or after October 7, 2001.

FOR FURTHER INFORMATION CONTACT: For eligibility issues, contact Robert Morris, Office of Field Programs (41A), National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington DC, 20420. Telephone: (202) 461-6365 (this is not a toll-free number). For regulatory issues, contact Jane Kang, Program Analyst, Legislative and Regulatory Service, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW,, Washington, DC 20420. Telephone: (202) 461-6216 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The goal of the National Cemetery Administration is to ensure that the burial needs of veterans and eligible family members are met by providing burial and memorialization in VA national cemeteries.

Subsection (a)(9) of 38 U.S.C. 2402, as added by section 502 of the Veterans' Benefits Act of 2010, authorizes the interment of parents of certain deceased veterans interred in VA national cemeteries, if the Secretary determines there is available space at the gravesite where the deceased veteran is interred. 38 U.S.C. 2402(a)(9); Pub. L. No. 111-275, sec. 502(b), 124 Stat. 2864, 2882 (Oct. 13, 2010). Authority to inter is limited to the biological or legally adoptive parents of a veteran who: (1) is a "hostile casualty" or died from a "training-related injury"; (2) is interred in a VA national cemetery in a gravesite with available space; and (3) at the time of the parent's death has no spouse or child who is buried, or surviving spouse or child who, upon death, may be eligible for burial, in a VA national cemetery as the spouse, surviving spouse, or minor child of the veteran. For purposes of eligibility for burial in a national cemetery, the term

“veteran” includes a person who died while in the active military, naval, or air service. 38 U.S.C. 2402(a)(1). Revision of 38 CFR 38.620 is necessary to reflect the new statutory authority for VA to inter qualifying parents of certain veterans in VA national cemeteries.

Under prior law, parents of veterans were not eligible for burial at a VA national cemetery unless they had attained eligibility through military service or marriage. However, recognizing the unique burden on the surviving parents of fallen servicemembers, the Act provides burial eligibility to those parents whose unmarried veteran son or daughter dies due to combat or training-related injuries. The Act also recognizes that national cemeteries are national shrines to honor eligible veterans and that gravesites should not be taken from those who have earned the right to burial in a national cemetery by serving their country. The Act accomplishes both goals by limiting the circumstances under which a parent is eligible for burial.

First, burial eligibility is limited to the biological or legally adoptive parents of a deceased veteran. The Act defines a “parent” as “a biological father or a biological mother or, in the case of adoption, a father through adoption or a mother through adoption.” 38 U.S.C. 2402(b)(1). This definition is intended not only to limit the type of parents who may be buried within the gravesite, but also to limit the number of parents who may be eligible for this benefit. See H. Rpt. No. 111-324, at 9 (2009) (“The [House Committee on Veterans’ Affairs] also intends that no more than two parents may be eligible for this benefit.”). A veteran can have only two biological parents who may be eligible for interment. In the case of adoption, an adoptive parent may be eligible for interment in the place of a biological parent but not in addition to a biological parent.

Thus, we interpret the statute to limit eligibility for parental interment to no more than two qualifying deceased parents within the gravesite of their deceased veteran child.

Second, at the time of the parent's death, the deceased veteran must not have a spouse or child who is buried, or a surviving spouse or child who, upon death, may be eligible for burial, in a VA national cemetery based on that individual's relationship to the veteran.

Third, under the Act, the Secretary must determine that space is available at the veteran's gravesite for a parent of that veteran to be eligible for burial. The Act itself provides a parent with eligibility for burial only "if the Secretary determines that there is available space at the gravesite." 38 U.S.C. 2402(a)(9)(A). Accordingly, the Act requires the Secretary to determine whether there is sufficient room at the particular gravesite to accommodate the burial of a parent. If space is available, then a parent may be eligible for burial, but if space is not available, then a parent is not eligible for burial.

Finally, for a parent of a deceased veteran to be eligible for burial in a national cemetery, the deceased veteran must meet the statutory definition of a "hostile casualty" or have died from a "training-related injury." The Act defines the term "hostile casualty" as "a member of the Armed Forces [who] dies as the direct result of hostile action with the enemy, while in combat, while going to or returning from a combat mission if the cause of death was directly related to hostile action, or while hospitalized or undergoing treatment at the expense of the United States for injury incurred during combat, and includes a person killed mistakenly or accidentally by friendly fire directed at a hostile force or what is thought to be a hostile force." 38 U.S.C. 2402(b)(2). The

term “hostile casualty” does not include “a person who dies due to the elements, a self-inflicted wound, combat fatigue, or a friendly force while the person was in an absent-without-leave, deserter, or dropped-from-rolls status or was voluntarily absent from a place of duty.” Id. The Act defines the term “training-related injury” as “an injury incurred by a member of the Armed Forces while performing authorized training activities in preparation for a combat mission.” 38 U.S.C. 2402(b)(3). The provisions of section 502 of the Act apply only to a qualifying parent who dies on or after October 13, 2010, and whose veteran child is a “hostile casualty” or dies from a “training-related injury” on or after October 7, 2001. Pub. L. No. 111-275, sec. 502(e), 124 Stat. at 2883. The above-mentioned definitions have been incorporated into the regulatory text of this rule.

Administrative Procedure Act

The changes made by this final rule merely reflect statutory provisions or VA’s interpretation of statutory requirements. The primary purpose of the amendment is to conform § 38.620 to the statute and implement VA’s interpretation of 38 U.S.C. 2402(a)(9) and (b). Section 553(b) of title 5, U.S. Code, does not apply to restatement of statutory terms, nor to interpretive rules. Accordingly, there is a basis for dispensing with prior notice and opportunity to comment. Moreover, under section 553(d), such rules do not require 30 days prior notice before they may become effective. Therefore, there is a basis for dispensing with the delayed effective date provisions of 5 U.S.C. 553(d).

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This final rule will directly affect only individual beneficiaries and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3520).

Catalog of Federal Domestic Assistance Program Number

The Catalog of Federal Domestic Assistance program number for this document is 64.201, National Cemeteries.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on January 4, 2012, for publication.

List of Subjects in 38 CFR Part 38

Administrative practice and procedure, Cemeteries, Veterans Cemeteries.

Dated: January 26, 2012

Robert C. McFetridge,
Director of Regulation Policy and Management,
Office of the General Counsel,
Department of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 38 is amended as follows:

PART 38—NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS

AFFAIRS

1. The authority citation for Part 38 is revised to read as follows:

Authority: 38 U.S.C. 107, 501, 512, 2306, 2402, 2403, 2404, 2408, 2411, 7105.

2. Amend § 38.620 to add paragraph (i) to read as follows:

§ 38.620 Persons eligible for burial.

* * * * *

(i)(1) Any biological or legally adoptive parent who dies on or after October 13, 2010, and whose deceased child:

(i) Is a veteran who dies on or after October 7, 2001, and

(A) Except as provided in paragraph (i)(2) of this section, dies as the direct result of hostile action with the enemy, while in combat, while in transit to or from a combat mission if the cause of death is directly related to hostile action, or while hospitalized or undergoing treatment at the expense of the United States for injury incurred during combat; or

(B) Is killed mistakenly or accidentally by friendly fire that was directed at a hostile force or what was thought to be a hostile force; or

(C) Died from a training-related injury while performing authorized training activities in preparation for a combat mission;

(ii) Is interred in a national cemetery; and

(iii) Has no spouse or child who is buried, or surviving spouse or child who, upon death, may be eligible for burial, in a national cemetery under paragraph (e) of this section.

(2) A parent is not eligible for burial if the veteran dies due to the elements, a self-inflicted wound, combat fatigue, or a friendly force while the veteran was in an absent-without-leave, deserter, or dropped-from-rolls status or was voluntarily absent from a place of duty.

(3)(i) A parent may be buried only within the veteran child's gravesite.

(ii) No more than two parents are eligible for burial per deceased veteran child.

(4) Parent burial eligibility is subject to a determination by the Secretary that there is available space within the veteran's gravesite.

[FR Doc. 2012-2043 Filed 01/30/2012 at 8:45 am; Publication Date: 01/31/2012]